

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

STEVE WICKENS, individually and
on behalf of others similarly situated,

Plaintiff,

vs.

Blue Cross of California, Inc., d/b/a
Anthem Blue Cross; Anthem Blue
Cross Life and Health Insurance
Company,

Defendants.

CASE NO. 15cv834-GPC(JMA)

**ORDER DENYING PLAINTIFF'S
MOTION TO REMAND, DENYING
DEFENDANTS' MOTION TO
STAY AS MOOT AND GRANTING
PLAINTIFF LEAVE TO AMEND
THE COMPLAINT**

[Dkt. Nos. 8, 11.]

Before the Court is Plaintiff's motion to remand to state court. (Dkt. No. 8.) Also, before the Court is Defendants' motion to stay, or in the alternative, for an extension of time to respond pending ruling on § 1407 transfer motion. (Dkt. No. 11.)

Based on the briefs, supporting documentation, and the applicable law, the Court DENIES Plaintiff's motion to remand, and DENIES Defendants' motion to stay as moot. The Court also GRANTS Plaintiff leave to file an amended complaint.

Background

On March 16, 2015, Plaintiff Steven Wickens ("Plaintiff") filed a class action complaint against Defendants Blue Cross of California Inc., d/b/a Anthem Blue Cross; and Anthem Blue Cross Life and Health Insurance Company in San Diego Superior Court for state law causes of action based on Defendants' failure to secure and

1 | safeguard Plaintiff's personal identifying information ("PII").

According to the complaint, on February 4, 2015, Anthem, Inc., a related entity, announced that cyber hackers had gained unauthorized access to its information technology system exposing the name, personal information, birthday, Social Security number, health care ID number, income data, employment data, street address, email address, and other personal details of about 80 million current and former customers and employees. (Dkt. No. 1-2, Compl. ¶ 4.) The class action complaint alleges causes of action for breach of contract, violation of the California Records Act, violation of the California unfair competition laws, negligence, invasion of privacy, public disclosure of private facts and unjust enrichment. (Dkt. No. 1-2, Compl.)

11 On April 15, 2015, Defendants removed the case to this Court under the Class
12 Action Fairness Act, (“CAFA”). (Dkt. No. 1, Notice of Removal at 6.) On April 24,
13 2015, the case was transferred to the undersigned judge pursuant to the low number
14 rule. See Local Civ. R. 40.1. (Dkt. No. 7.) On May 5, 2015, Plaintiff filed a motion
15 to remand. (Dkt. No. 8.) Defendants filed an opposition on May 22, 2015. (Dkt. No.
16 15.) Plaintiff filed a reply on May 29, 2015. (Dkt. No. 18.) On May 7, 2015,
17 Defendants filed a motion to stay, or in the alternative, for an extension of time to
18 respond pending ruling on 28 U.S.C. § 1407¹ transfer motion. (Dkt. No. 11.) Plaintiff
19 filed an opposition on May 22, 2015. (Dkt. No. 14.) Defendants filed a reply on May
20 29, 2015. (Dkt. No. 19.)

21 During the pendency of these motions, on June 8, 2015, the United States
22 Judicial Panel on Multidistrict Litigation (“JPML”) in the case of In Re: Anthem, Inc.
23 Customer Data Security Breach Litigation transferred 16 cases to the United States
24 District Court for the Northern District of California and assigned the case to District

¹28 U.S.C. § 1407 provides in relevant parts, “(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.” 28 U.S.C. § 1407.

1 Judge Lucy H. Koh for coordinated or consolidated pretrial proceedings pursuant to
 2 28 U.S.C. § 1407. (MDL Case No. 2617, Dkt. No. 262.) On June 9, 2015, the JPML
 3 issued a conditional transfer order that included this case. (MDL Case No. 2617, Dkt.
 4 No. 263.) Pursuant to the Rules of Procedure of the United States Judicial Panel on
 5 Multidistrict Litigation, the conditional order is stayed for a period seven days to allow
 6 parties to file an opposition. R. Proc. Jud. Panel Multi. Litig. 7.1(c). On June 16, 2015,
 7 Plaintiff filed a timely opposition, which triggered a briefing schedule. (MDL Case
 8 No. 2617, Dkt. Nos. 274, 275.)

9 The JPML's Rules of Procedure provide that:

10 The pendency of a motion, order to show cause, conditional transfer
 11 order or conditional remand order before the Panel pursuant to 28
 12 U.S.C. § 1407 does not affect or suspend orders and pretrial
 13 proceedings in any pending federal district court action and does not
 14 limit the pretrial jurisdiction of that court. A transfer or remand
 15 pursuant to 28 U.S.C. § 1407 shall be effective only upon its filing
 16 with the clerk of the transferee district court.

17 R. Proc. Jud. Panel Multi. Litig. 2.1(d). A "district judge should not automatically stay
 18 discovery, postpone rulings on pending motions, or generally suspend further rulings
 19 upon a parties' [sic] motion to the MDL Panel for transfer and consolidation." Rivers
v. Walt Disney Co., 980 F. Supp. 1358, 1360 (C.D. Cal. 1997). Therefore, since the
 20 conditional transfer order is still pending on this case, the Court has jurisdiction to
 21 consider the motion to remand.

22 **A. Which Court Determines Motion to Remand**

23 The parties disagree whether this Court or the MDL Court should rule on the
 24 motion to remand. Defendants argue that the motion to remand should be deferred for
 25 consideration by the JPML once transferred. They contend that these issues are not
 26 unique and have been raised in other removal cases in four other actions and therefore
 27 consistency, uniformity and predictability in rulings mandate that the JPML decide the
 28 motion to remand. Plaintiff contends that this Court should rule on the motion to
 remand because this court must address threshold issues of subject matter jurisdiction
 before a motion to stay.

Generally a court may not rule on the merits of a case without first determining whether it has subject matter jurisdiction over the case. Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp., 549 U.S. 422, 425 (2007) (court has discretion to rule on forum non conveniens prior to subject matter jurisdiction since it is a nonmerits issue); Potter v. Hughes, 546 F.3d 1051, 1061 (9th Cir. 2008). However, there is no “mandatory ‘sequencing of jurisdictional issues.’” Sinochem Int'l Co. Ltd., 549 U.S. at 431. Federal courts have leeway to decide which threshold grounds “for denying audience to a case on the merits.” Id. (quoting Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 585 (1999)). Since multi-litigation cases involve considerations of “judicial economy and consistency”, motions to stay may be considered before remand motions. See Pacific Inv. Mgmt. Co. LLC v. American Int'l Group, Inc., No. SA CV 15-687-DOC, 2015 WL 3631833, at *4 (C.D. Cal. June 10, 2015). Moreover, the JPML has held that a district judge has the discretion to address a motion to remand or decline to rule on the motion to remand and wait for a transfer order. In re Asbestos Products Liability Litigation, 170 F. Supp. 2d 1348, 1349 n. 1 (Jud. Pan. Mult. Lit. 2001).

District courts in the Ninth Circuit have resolved this issue differently in JPML cases. Ramirez v. Our Lady of Lourdes Hosp. at Pasco, No. 1:13cv1108-RSM, 2013 WL 5373213, at *2 (W.D. Wash. Sept. 25, 2013) (citing cases and ultimately deciding to address jurisdictional issue before motion to stay). When motions to stay and to remand are pending, “deference to the MDL court for resolution of a motion to remand often provides the opportunity for the uniformity, consistency, and predictability in litigation that underlies the MDL system.” Conroy v. Fresh Del Monte Produce, Inc., 325 F. Supp. 2d 1049, 1053 (N.D. Cal. 2004). (citation and internal quotation marks omitted). In deciding whether to rule on the motion to remand, “courts consider whether the motion raises issues likely to arise in other actions pending in the MDL transferee court.” Id.

In Freisthler, the court granted a stay pending the MDL’s panels’ transfer determination in light of a motion to remand. Freisthler v. DePuy Orthopaedics, Inc.,

1 No. CV 11-6580 DSF(FFMx), 2011 WL 4469532, at *2 (C.D. Cal. Sept. 21, 2011).
 2 The court explained that the issues in the plaintiff's motion to remand are "likely to
 3 arise in other actions pending in the MDL transferee court." Id. at 2. Among the 23
 4 cases that were removed from state courts, in three cases, the plaintiffs moved for
 5 remand, and in 11 cases, the plaintiffs stipulated to a stay in exchange for an extension
 6 of time to file a remand motion in the MDL proceedings. Id. at 2. Therefore, since 14
 7 cases involving remand issues were to be considered by the MDL and where in 2 of the
 8 cases the specific remand at issue was also raised, the court granted defendant's motion
 9 to stay. Id. at 2-3.

10 According to Defendants, there are 98 similar lawsuits in the country. (Dkt. No.
 11 1, Notice of Removal ¶ 4.) 90 cases have been filed in various United States District
 12 Courts; 33 of those cases have been filed in the Southern District of Indiana; and 7
 13 cases have been filed in the Southern District of California. (Id.) Eight cases have
 14 been filed in state court, including two cases in San Diego Superior Court, which have
 15 been removed to federal court. (Id.)

16 In their brief, Defendants assert that the issue of remand has been raised in four
 17 cases filed against Anthem subsidiaries. See Vasquez v. Blue Cross of California, No.
 18 15-cv-02055 (C.D. Cal.); Sabatino, et al v. HMO Missouri, Inc., et al, No. 15-cv-00575
 19 (E.D. Mo.); Noble, et al v. RightChoiceManaged Care, Inc., et al, No. 15-cv-00626
 20 (E.D. Mo.); and Stanturf v. Amerigroup Corporation, No. 15-cv-07933 (Dist. Ks.).

21 Defendants rely on Vasquez to support their position. In Vasquez v. Blue Cross
of California, Case No. 15cv2055-MWF(AGRx) (C.D. Cal. May 5, 2015), the district
 22 court denied the plaintiff's motion to remand because it concluded that the court had
 23 subject matter jurisdiction. (Dkt. No. 15-1, Ds' Opp, Ex. A.) Defendants' argument
 24 concerning the importance of Vasquez is misplaced. The district court in Vasquez
 25 made a determination on subject matter jurisdiction and denied the motion to remand
 26 after conducting an analysis of the CAFA requirements. Therefore, issue of remand
 27 will not be addressed by the JPML.

1 In Sabatino, the motion to remand raised issues, among other things, concerning
 2 minimal diversity. (Case No. 15cv575, Dkt. No. 15 (E.D. Mo.).) While the motion is
 3 fully briefed, the district court has not yet ruled on this motion. (*Id.*) In Noble, the
 4 motion to remand did not raise the issue of minimal diversity but the issue raised was
 5 the amount in controversy and the home-state exception under CAFA. (Case No.
 6 15cv626-CDP, Dkt. No. 16 (E.D. Mo.).) While fully briefed, the Court has not yet
 7 ruled on this motion. (*Id.*) Lastly, there is no pending motion to remand in Stanturf;
 8 Stanturf was removed from state court and the district court granted Defendants'
 9 unopposed motion to stay. (Case No. 15cv7933-JAR-TJJ, Dkt. No. 20 filed 6/2/15
 10 (Dist Ks.).)

11 Among the four cited cases that have been removed from state court, only two
 12 cases, Sabatino and Noble, have pending motions to remand and only one case,
 13 Sabatino raises a remand issue related to minimal diversity, the issue in this case.
 14 Moreover, it is not clear whether the motion to remand in Sabatino and Noble will be
 15 determined by the district court or the transferee court since no stay has been issued.
 16 The Court concludes that concerns regarding uniformity, consistency, and
 17 predictability does not play a role in this case.

18 Another factor district courts look at to determine whether to rule on a motion
 19 to remand with a pending § 1407 transfer is whether the jurisdictional issue appears to
 20 be factually or legally difficult and whether those issues have been raised in other cases
 21 transferred or likely to be transferred. See Conroy, 325 F. Supp. 2d at 1053. In this
 22 case, the issue of minimal diversity is not complex and does not involve a complicated
 23 and in-depth analysis. Only one other case, the Sabatino case, has raised an issue as
 24 to minimal diversity. Therefore, the Court concludes that Defendants' argument that
 25 the Court defer ruling on the motion to remand in order for the transferee court to
 26 address it is not persuasive. In fact, in the interest of judicial economy and efficiency,
 27 the Court will address Plaintiff's motion to remand.

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1 **B. Motion to Remand**

2 Plaintiff argues the case should be remanded because Defendants have not
 3 proven by a preponderance of the evidence² that there is minimal diversity to satisfy
 4 subject matter jurisdiction. Defendants contend that they have met their burden to
 5 demonstrate minimal diversity.

6 Removal jurisdiction is governed by 28 U.S.C. § 1441 *et seq.* A state court
 7 action can only be removed if it could have originally been brought in federal court.
 8 Caterpillar, Inc. v. Williams, 482 U.S. 386, 392, 107 (1987); Duncan v. Stuetzle, 76
 9 F.3d 1480, 1485 (9th Cir. 1996). Federal courts have original jurisdiction over class
 10 actions where 1) any member of the plaintiff class is diverse from any defendant; 2) the
 11 proposed class contains 100 or more putative class members; 3) and the amount in
 12 controversy exceeds the “sum or value of \$5,000,000, exclusive of interest and costs.”
 13 28 U.S.C. § 1332(d); Rodriguez v. AT & T Mobility Servs., LLC, 728 F.3d 975, 978
 14 (9th Cir. 2013). Plaintiff only moves on the first factor alleging that Defendants failed
 15 to demonstrate minimal diversity under CAFA, that at least one Plaintiff must be
 16 diverse from Defendants. The parties do not dispute that Defendants are citizens of
 17 California.

18 There is no presumption against removal jurisdiction in CAFA cases. Dart
 19 Cherokee Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 554 (2014); see also
 20 Allen v. Boeing Co., 784 F.3d 625, 633 (9th Cir. 2015) (citing Dart Cherokee Basin
 21 Operating Co., 135 S. Ct. at 554). Defendants bear the burden of establishing removal
 22 jurisdiction, even in CAFA cases. Washington v. Chimei Innolux Corp., 659 F.3d 842,
 23 847 (9th Cir. 2011). A notice of removal must contain a “short and plain statement of
 24 the grounds for removal.” 28 U.S.C. § 1446(a)). This requirement tracks the pleading

25 ²Plaintiff argues that Defendants must demonstrate by a preponderance of the
 26 evidence that there is minimal diversity. Plaintiff cites to numerous cases in support;
 27 however, these cases only address the preponderance of the evidence standard as it
 28 concerns the amount in controversy, not minimal diversity. None of the cases address
 minimal diversity. In fact, in most of the cases, the issue of minimal diversity is not
 even challenged.

1 requirement in Federal Rules of Civil Procedure 8. Dart Cherokee Basin Operating
 2 Co., 135 S. Ct. at 553.

3 Minimal diversity requires that a “member of a class of plaintiffs is a citizen of
 4 a State different from any defendant.” 28 U.S.C. § 1332(d)(2)(A). A person’s
 5 citizenship is determined by the person’s state of domicile, not the state of residence.
 6 Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001). “A person’s
 7 domicile is her permanent home, where she resides with the intention to remain or to
 8 which she intends to return.” Id. (citation omitted). A person residing in a given state
 9 is not necessarily domiciled there, and thus is not necessarily a citizen of that state. Id.
 10 (citing Weible v. United States, 244 F.2d 158, 163 (9th Cir. 1957) (“Residence is
 11 physical, whereas domicile is generally a compound of physical presence plus an
 12 intention to make a certain definite place one’s permanent abode, though, to be sure,
 13 domicile often hangs on the slender thread of intent alone, as for instance where one
 14 is a wanderer over the earth. Residence is not an immutable condition of domicile.”)).

15 In this case, the Complaint alleges,

16 **California Class**
 17 All residents of California who entered into contracts with Blue Cross
 18 and/or Blue Cross Life and had their personal information
 compromised as a result of the Security Breach. Excluded are
 Defendants and judge(s) assigned to this case.

19 (Dkt. No. 1-2, Class Action Compl. ¶ 41.)

20 Defendants contend that Plaintiff’s use of the word “residents” does not
 21 foreclose the inclusion of non-California citizens, such as students or members of the
 22 military temporarily housed in California. (Dkt. No. 1, Notice of Removal ¶¶ 22.)
 23 Specifically, Defendants argue they have sufficiently alleged CAFA’s minimal
 24 diversity requirement because Defendant Anthem Blue Cross participates in a Blue
 25 Cross Blue Shield Association “guest member” program where Anthem Blue Cross
 26 offers memberships to insured of other Blue Plans who are temporarily residing in
 27 California. (Id. ¶ 23.) Anthem had 991 guest members in 2014 which include
 28 students, members of the military and individuals on temporary work assignments.

1 (Id.)

2 Plaintiff argues that insureds that contracted with “other Blue Plans” are not
 3 contemplated in the class since the class members must have “entered into contracts
 4 with Blue Cross and/or Blue Cross Life.” Therefore, the potential class does not
 5 include “guest members” who purchased and contracted insurance from third parties.
 6 Moreover, without legal authority, Plaintiff argues that by looking at the context of the
 7 complaint, a “resident” could only mean people domiciled in California. However,
 8 such a proposition is not compelling.

9 “Under the Away From Home program, individuals who permanently live in and
 10 have HMO insurance from a participating Blue Plan in another state but will be
 11 temporarily living in California are eligible for Guest Membership with Anthem Blue
 12 Cross.” (Dkt. No. 15-3, Aden Decl. ¶ 2.) Anthem Blue Cross had about 991 guest
 13 members which mean they have HMO insurance from a Blue Plan in another state
 14 where they live permanently and who are or were residing temporarily in California.
 15 (Id. ¶ 3.) These guest members must submit an application and obtain coverage from
 16 Defendant Anthem Blue Cross and receive a Anthem Blue Cross membership card.
 17 (Dkt. No. 15-2 at 5.)

18 Since these guest members must submit a separate application with Anthem Blue
 19 Cross to participate in the “Away From Home” program, it would appear that they
 20 would fall under the class of members “who entered into contracts with Blue Cross
 21 and/or Blue Cross Life.” (Dkt. No. 1-2, Class Action Compl. ¶ 41.) Therefore,
 22 Defendants have sufficiently shown that there is minimal diversity, and the Court has
 23 subject matter jurisdiction over the case.

24 Alternatively, Plaintiff offers to amend the complaint to change the term
 25 “residents” to “citizens” in the class description to foreclose any argument that minimal
 26 diversity exists between the parties. (Dkt. No. 8-1 at 9.) Defendants assert that
 27 Plaintiff cannot amend the complaint to destroy minimal diversity as it existed at the
 28 time of removal. (Dkt. No. 15 at 17-18.)

Under CAFA, “[c]itizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint . . . indicating the existence of Federal jurisdiction.” 28 U.S.C. § 1332(d)(7). Citizenship of the plaintiff class is based on the complaint “as of the date the case became removable.” Mondragon v. Capital One Auto Fin., 736 F.3d 880, 883 (9th Cir. 2013). A plaintiff cannot destroy diversity by amendment after removal. Williams v. Costco Wholesale Corp., 471 F.3d 975, 076 (9th Cir. 2006) (reversing district court’s order of remand where case was removed on federal question jurisdiction, plaintiff later amended complaint to eliminate the only federal claim and to add new state law claims, and then filed a motion to remand); Sparta Surgical Corp. v. Nat’l Ass’n of Securities Dealers, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998) (plaintiff may not compel remand by amending a complaint where state court complaint alleged federal cause of action that was removable but then plaintiff sought to amend in federal court to drop the federal cause of action). The Ninth Circuit has interpreted Sparta as applicable only when the existence of federal question jurisdiction is determined from the complaint and the plaintiff seeks to amend the complaint to destroy federal jurisdiction. Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1046 n. 3 (9th Cir. 2000). However, when the initial complaint facially precludes removal, courts may properly consider a timely-filed amended complaint “as a clarification to the allegations bearing on the federal court’s jurisdiction.” Candy v. 474 Club LLC, No. CV-06-400-S-EJL, 2007 WL 1381806, at *3 (D. Idaho Jan. 31, 2007) (citing Schuster v. Gardner, 319 F. Supp. 2d 1159, 1163-64 (S.D. Cal. 2003), and Thornton v. New York Life Ins. Co., 211 F.R.D. 606, 608-09 (N.D. Cal. 2002)).

In a factually similar case in this district, District Judge Janis L. Sammartino concluded that the Plaintiff’s revision from “residents of California” to “citizens of California” in an amended complaint was a clarification rather than an amendment. Weight v. Active Network, Inc., 29 F. Supp. 3d 1289, 1293 (S.D. Cal. June 26, 2014). The court explained that the original complaint which was filed in state court was

1 limited to “residents” of California and because it was filed in state court, which has
2 no diversity jurisdiction issue and does not require a careful distinction between
3 “residents” and “citizens”, the plaintiff filed a first amended complaint to make clear
4 he only intended to sue California “citizens.” *Id.* at 1293. The court determined that
5 the plaintiff did not file a first amended complaint to manipulate the forum but clarify
6 a point that bears on the court’s jurisdiction. *Id.* at 1294.

7 Similarly, in this case, the Complaint alleges claims against California based
8 Defendants, alleges only California law causes of action, and the class was intended
9 to be limited to individuals who entered into contracts with California corporations for
10 future services in California. An amendment to change “residents” of California to
11 “citizens’ of California, in this case, would constitute a clarification and not an
12 amendment.

13 The Court construes Plaintiff's offer to amend the complaint as a request for
14 leave to file an amended complaint. Under the liberal policy permitting amendments
15 especially when it is sought early in a case, the Court exercises its discretion and
16 GRANTS Plaintiff leave to file an amended complaint. See Fed. R. Civ. P. 15(a); DCD
17 Programs Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987).

18 However, based on the complaint currently before the Court, the Court DENIES
19 Plaintiff's motion to remand.

Conclusion

21 Based on the above, the Court DENIES Plaintiff's motion to remand. Plaintiff
22 is granted leave to file an amended complaint and must file an amended complaint
23 within three (3) days. Once an amended complaint is filed, the Court will set an
24 expedited briefing schedule. Since the JPML has decided to transfer the case for

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1 coordinated and consolidated pretrial proceedings, the Court DENIES Defendants'
2 motion to stay as MOOT. The hearing set for June 19, 2015 shall be vacated.

3 IT IS SO ORDERED.

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5 DATED: June 18, 2015

6 
7 HON. GONZALO P. CURIEL
United States District Judge

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